

**Oregon State Bar analysis of House Bill 2548 and the
Reintroduction of surety bail in Oregon
Presented to the Oregon House Judiciary Committee**

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Summary

The following analysis examines House Bill 2548, which proposes to reintroduce surety bail in Oregon. This analysis identifies several fundamental problems, which are identified below. It is worth acknowledging that HB 2548 corrects some of the technical deficiencies of previous drafts, including LC 297 from the 2010 interim. The major concerns with the proposal, however, are systemic to the nature of the surety bail industry, and will likely be extremely difficult to correct without imposing substantial costs on the industry.

Concerns outlined in the analysis include:

- Severe reduction in restitution to crime victims and child support payments.
- Limitations to the court's ability to protect public safety through the use of release conditions.
- Increases in court workload and decreases in revenue generated for the courts.

Please note that this analysis does not include what costs are imposed on the Department of Consumer and Business Services, which HB 2548 designates as the agency responsible for licensing and regulating the surety bail industry.

Limiting the courts ability to impose and enforce release conditions.

House Bill 2548 would substantially limit the court's ability to use release conditions to ensure that a defendant behaves appropriately while awaiting trial. Under current law, courts routinely impose release conditions designed to protect the public when a defendant post security. Typically these conditions include not contacting the victim of the crime; not using drugs or alcohol; not contacting witnesses or co-defendants; not going to designated places; and the imposition curfews; as well as general conditions such as not committing new crimes. Judges have great latitude to craft whatever conditions of release are necessary in order to ensure that a defendant in a specific case is not a danger once released.

If a defendant violates one of these release conditions, their release can be revoked and their security can be forfeited. The threat of losing the security deposit is a major deterrent that keeps defendants from committing any number of bad acts. In many cases, a defendant's security deposit may have been posted in part by friends or family who will be able to motivate the defendant to abide by release conditions, because they themselves risk financial loss.

Moreover, police can take a defendant into custody if they violate release conditions. This typically might occur when a crime victim calls the police to inform them that a defendant has contacted them, or the

police see a person known to them to be out past curfew. This ability to actively enforce release conditions is an important public safety tool.

Under HB 2548, if a defendant posts a bail bond, that bail can ONLY be forfeited if a defendant fails to appear for court. This is made explicit in both Sections 8 and 9 of the bill. A defendant who contacts victims or witnesses in violation of a judge's orders cannot lose their bail for violation of release conditions.

In fact, under HB 2548 it is unclear whether the court can even require the defendant to agree to release conditions at all when the defendant posts bail. Section 4 of the bill appears to contemplate the possibility of a court issuing an arrest warrant for violation of release conditions other than failure to appear. However in Section 3 of the bill, statutory language requiring the defendant to execute a release agreement appears only in the subsection dealing with defendants who deposit security directly with the court. Similar language does not appear in the section dealing with bail bonds.

This appears to mean that a defendant cannot be re-incarcerated simply for the violation of standard release conditions. Police would have no power to arrest a defendant for merely contacting a victim, because that contact in and of itself is not normally a crime. A judge could possibly hold a defendant in contempt of court, but that would require a new charge and a new court process, and would be considerably slower and more expensive than the current system.

In either case, HB 2548 eliminates the court's ability to use bail forfeiture as a tool to ensure that defendants abide by "public safety conditions" in release agreements.

Constitutional Conflict in Eliminating Release Conditions

The functional elimination of the ability of judges to require release conditions for a victim posting bail may violate the Victim's Rights provisions of Oregon's Constitution. Article 1, Section 43(1)(b) states that victims in all prosecutions for crimes have:

"the right to have decisions by the court regarding the pretrial release of a criminal defendant based upon the principle of reasonable protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for the trial."

House Bill 2548 clearly eliminates protection for crime victims by prohibiting the court from imposing release conditions which are enforceable through loss of bail. The bill creates a system where the criminal defendant has the power to choose a method of pre-trial release – the posting of a bail bond – under which the court has less ability to restrict the defendant's behavior, and less ability to protect crime victims.

There are compelling reasons to believe that this aspect of House Bill 2548 may be unconstitutional.

The Illusion of Extra Supervision

This process creates an illusion of extra supervision of the defendant, when in reality there is far less supervision than under current law. The number of cases where a defendant literally attempts to flee and

where a bail recovery agent might have to go after them are extremely small. A defendant fleeing in that way is not at all typical in the criminal justice system.

On the other hand, by limiting the court's ability to use release conditions to modify the defendant's behavior while on release, HB 2548 provides defendants far more freedom to misbehave while on the street.

It is important to remember that while the worst crimes with the strictest punishment may dominate the news and our attention, the greatest volume of crimes in our courts are misdemeanors and comparatively minor felonies. While bail recovery agents might serve a purpose in a tiny handful of cases where a defendant actually flees the state, in the vast majority of cases the bail agents will have no role in supervising defendants at all. In these cases criminal defendants will be subject to fewer restrictions on their behavior and fewer consequences for their misbehavior.

Reductions in Restitution to Crime Victims, Child Support Payments, and Payment of Court Fees

Perhaps the most concerning aspect of this bill is that it will likely result in a significant decrease in the amount of child support, restitution and court fees those defendants released on bail actually pay.

Under current practice, if a defendant has deposited money for security release, that money is applied to outstanding restitution, fines and assessments before it is returned to a defendant upon conclusion of the case. This provides a very cheap and very effective method of making sure that convicted defendants actually pay restitution and other financial obligations.

It is important to understand that this is not limited to defendants that violated release conditions or failed to show up to court, and does not require that security be forfeited. Current law permits withholding security from defendants even if they appeared for court and complied with all release conditions.

House Bill 2548 completely eliminates the ability of the court to retain restitution from a defendant who posts a bail bond. Nor can the court retain money posted in the form of a bail bond in order to pay criminal fines, assessments or other financial obligations. All of this money must be returned to the surety upon the conclusion of the case, regardless of the defendant's financial obligations.

Likewise, if a defendant with unsatisfied child support obligations posts a security deposit, up to two thirds of that amount may be withheld after judgment is entered in order to pay those obligations. This is an extremely important tool that is used to recover child supports from parents who are not meeting their obligations. House Bill 2548 explicitly eliminates this authority to keep child support if the defendant posted a bail bond instead of depositing security directly with the clerk.

As we know from the percentage of defendants whose lawyers are court appointed; most defendants in Oregon have relatively limited assets and incomes. It is very common for defendants to end up owing very large amounts of restitution and court fees which may take the defendant many years to repay, or which may never be paid in full. Because many defendants have relatively little money, in many cases there is little that the courts or crime victims can do to recover these debts.

However, defendants who are in custody are often able to come up with additional funds in order to post a security deposit. In a great many cases, monies withheld from security deposits are the only money crime victims will ever get from defendants. House Bill 2548 eliminates this possibility entirely in the case of defendants who post bail.

While the use of bail does not actually eliminate a defendant's financial obligations, it does eliminate a very cheap and efficient method that courts use to see that those financial obligations are at least partially met. House Bill 2548 will decrease revenue going to child support and crime victims, while simultaneously increasing the cost of collection.¹

Constitutional Conflict in Eliminating Court's Ability to Withhold Restitution

House Bill 2548 may also violate the Victim's Rights provisions of Oregon's Constitution by effectively eliminating the ability of the court to apply money from bail directly to restitution. Article 1, Section 42(1)(d) provides that crime victims have:

The right to receive prompt restitution from the convicted criminal who caused the victim's loss or injury.

House Bill 2548 will – at the very least – substantially slow the process of victims recovering restitution, because the court can no longer simply apply bail payments to restitution. The victim would have to wait until the convicted criminal chose to voluntarily make restitution payments, or until the victim or the courts could take some kind of enforcement action, likely slowing the process by months or years.

In reality though, there will be a substantial number of crime victims who never receive restitution at all directly because of this bill. As stated above, in many cases money withheld from security deposits is the only restitution ever recovered. Under current law there are many convicted criminals who fail to pay restitution. HB 2548 will add to that number by eliminating a quick and easy method of making sure that at least some money is recovered.

Significant increase in court workload by the creation of a parallel release system

There are a number of aspects of House Bill 2548 that increase the workload on the court system. One of the major ones relates to the process by which bail is declared forfeited.

Under current law, if a defendant violates a release condition – including by simply not appearing in court – the judge may simply order from the bench that the defendant's release is revoked, and that their security deposit is forfeited. This is a relatively simple and straightforward process that requires minimal staff time.

¹ It is worth noting that defense lawyers arguably have some responsibility to explain to their clients the financial ramifications of posting bail rather than posting a security release. This means that defendants may be informed by their lawyers that they can better avoid paying their debts by posting bail than by posting security directly with the court.

Under HB 2548, the judge must enter an order declaring the bail forfeited. This order will have to be processed by court staff – a process that in some counties already takes weeks. Once the order is entered, the court is then required to serve notice of the forfeiture on the bail agent. This is an entirely new process that courts do not currently need to undertake, and it will need to be done on every single failure to appear by a defendant who posted bail. All told, it will often take multiple weeks from when a defendant misses court until a bail agent is actually notified.

Most defendants who fail to appear for court are not attempting to flee, or to avoid justice in the sense we might imagine. Most are simply engaging the same type of irresponsible behavior that likely caused them to be arrested in the first place. Under current practice, the majority of defendants who fail to appear for court either turn themselves in within a few days, or they contact their lawyers who will reschedule them for court. In these cases, bail agents will have no involvement in the process of returning the defendant to court, and indeed will likely be *unaware that the defendant even missed their court date* because of the length of time it will take to process the initial order and provide notice.

However, in every single one of these cases, the court will then have to process yet another order, setting aside the previous order of forfeiture and discharging the surety insurer or their obligations under the bail bond.

In the case of a typical FTA, House Bill 2548 will require multiple court orders and the issuance of notice to the bail agent, even though the agent will have literally no involvement in making sure the defendant appears in court.

Minimal Revenue for Court Operations

House Bill 2548 specifies that when bail is posted, it must be accompanied by a fee of 1% of the security amount. Presumably this fee is intended to offset the cost of managing the bail system.

However, this fee is less than the functional 1.5% that courts are already allowed to keep when defendant's post a security release. This, when combined with the reduction in court fees that are recouped through keeping security deposits means that the court system will have to maintain two systems of release instead of one, and will have to do it with less revenue than they currently receive.

Effect on Jail Occupancy and Incarceration Costs

Many Oregon counties operate with their jails at or very near full occupancy on a constant basis. While all Oregon counties have to make intelligent release decisions to manage their jail populations, counties with crowded jails have to make daily decisions regarding which inmates to release in order to best protect public safety and public resources.

It is unclear how these counties will operate under House Bill 2548. In many locales, law enforcement use the process of “citing and releasing” defendants who they do not wish to incarcerate. Sometimes this involves being taken to the jail for a booking procedure and sometimes it merely involves the officer giving the defendant a citation to appear in court at a later time. This is an important law enforcement tool in counties where jail capacity is not adequate to house everyone who is arrested.

Under HB 2548, it is unclear whether counties are required to take custody of defendants who are brought in on warrants by bail recovery agents. If this is a requirement, then it would threaten local jails with the prospect of emergency releases of more dangerous offenders in order to house lesser offenders who failed to appear in court. Any statutes that threaten local jurisdictions' abilities to make their own determinations regarding jail populations are troubling.

Conclusion

Oregon currently has a very effective and efficient system of pretrial release. The vast majority of failures to appear are dealt with efficiently through a combination of the efforts of law enforcement, judges and defense lawyers. The current system results in the recovery of a substantial amount of money for restitution and other financial obligations. Most importantly the system prioritizes protecting victims and the public by imposing real consequences for the violation of release conditions.

Very few defendants "escape justice" by fleeing the state or habitually refusing to show up for court. Defendants who develop a history of failing to appear are dealt with through more severe sentences upon conviction, and higher bail amounts when they are arrested. These defendants quickly find themselves in a position where it is much more difficult to be released pre-trial.

House Bill 2548 does not improve upon the current system, and seems largely designed to insert middlemen into a process that works well without them. In short it is a solution in search of a problem. One that will impose substantial costs – both financial costs and public safety costs – on Oregonians.